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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PETER PIERO SOLOMON, Defendant and Appellant.	A129352 (Contra Costa County Super. Ct. No. 5-100197-3)

A search of the residence of defendant Peter Piero Solomon, conducted pursuant to a warrant, yielded evidence of his illegal possession of methamphetamine and items forbidden to defendant as a convicted felon. After the trial court denied defendant's motion to quash or traverse the search warrant, a jury found him guilty of being a past-convicted felon in possession of a firearm and ammunition (Pen. Code, former §§ 12021, subd. (a)(1), 12316, subd. (b)(1)), possession of methamphetamine for the purpose of sale (Health & Saf. Code, § 11378), and the actual sale of that controlled substance (Health & Saf. Code, § 11379). The trial court found true enhancement allegations that defendant had two prior felonies (Pen. Code, § 667.5, subd. (b)), and then sentenced him to state prison for an aggregate term of three years and eight months.

Defendant advances three contentions on this appeal. First, defendant argues that his trial counsel was constitutionally incompetent for not seeking suppression of the evidence on the additional ground that the search was improperly conducted at night, which requires reversal of all defendant's convictions. Second, defendant argues the jury was improperly instructed on the principles of accomplice credibility, which assertedly

requires reversal of the two drug-related convictions. Concerning his second contention, defendant faults the trial court for neglecting its duty to instruct the jury on the applicable principles of law; if this approach fails, defendant again wants to have responsibility placed on his trial counsel. Third, on the assumption that his first and second contentions are valid, defendant asserts his trial counsel prejudicially failed to move for acquittal on all charges at the close of the prosecution's evidence. We see no reversible error and affirm.

BACKGROUND

Michael Renschler was an employee of a gas station, a long-time user of methamphetamine, and a friend of defendant, who sold him methamphetamine. On the evening of January 2, 2010, defendant was on his way to the station to deliver some methamphetamine to Renschler when he was spotted by Deputy Sheriff Pliler driving a vehicle without current registration. At Pliler's request, Deputy McDevitt began observing defendant.

When defendant got to the station, he exchanged a small bindle for cash from Renschler. Defendant also asked Renschler to retrieve "something" from the car ashtray, "hang on to it and he will pick it up later." Renschler reached inside the car and pulled out of the dashboard ash tray a sandwich baggie containing what Renschler assumed was methamphetamine. When defendant left the station, Deputy McDevitt radioed what he had seen, namely, "a drug transaction," to Deputy Pliler.

Deputy Pliler stopped defendant's car. Deputy McDevitt then arrived with a dog trained to detect the smell of methamphetamine. The dog "alerted," signaling the smell of a controlled substance. However, although defendant had a considerable amount of cash, no "contraband" was found on him or in his car.

The deputies believed defendant was under the influence of a controlled substance. After he was arrested for that offense, the deputies took defendant back to the gas station. After a fair amount of questioning of Renschler, the deputies concluded that he, too, was under the influence. Renschler refused permission to search the gas station office, where he'd secreted the baggie taken from defendant's car. After the dog "alerted" in the

station office, Renschler admitted to have methamphetamine on him. The bindle defendant sold him was found in Renschler's wallet, and Renschler too was arrested. After he and defendant were taken to a police station, Renschler told the deputies that he "bought the meth" from defendant. He also revealed the location of the baggie he took from defendant's car. The baggie contained a lump of white crystal substance that Deputy McDevitt described as being of "golf-ball size."

Deputy McDevitt applied for a warrant authorizing a search of defendant's apartment. The search, conducted the next day, January 3, 2010, with the dog, produced the following: in the living room, a scale with methamphetamine residue, a glass pipe for smoking methamphetamine, and "a single .25 caliber unexpended bullet"; in the bedroom, "a .25 caliber handgun with a magazine"; and in the kitchen, another scale and packaging that matched that used in the bindle found on Renschler. Expert testimony established that the substances seized were in fact methamphetamine. The testimony of another expert constituted a basis for the jury concluding that defendant possessed methamphetamine for the purpose of selling it.

Defendant did not testify or present evidence on his behalf.

REVIEW

I

Defendant's first contention is that his trial counsel was constitutionally incompetent because, although he did move to suppress evidence generated by the search, he did not do so on the ground that the warrant did not authorize nighttime service of the warrant, and thus the search was conducted in violation of Penal Code section 1533. Ordinarily, appellate review of a suppression motion that was not made is problematic. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 [no direct review of counsel's failure to challenge legality of search].) Here, however, a motion was made, and the factual basis for defendant's contention is uncontradicted. In these somewhat unusual circumstances, we will address the merits of that contention.

Penal Code section 1533 provides in pertinent part: "Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search warrant

that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 a.m. and 10 p.m." There is no dispute that the warrant, which was issued at 4:10 a.m. on January 3, 2010, did not authorize nighttime service, and that defendant's apartment was searched approximately 50 minutes later at 5:00 a.m. Thus, a violation of Penal Code section 1533 appears to have occurred.

However, that is a matter of state law, and suppression is required only if mandated by federal law. (Cal. Const., art. I, § 28, subd. (d); *People v. McKay* (2002) 27 Cal.4th 601, 608; *People v. Hines* (1997) 15 Cal.4th 997, 1043-1044.) Following adoption of the cited constitutional provision, California accepts the rule that a violation of Penal Code section 1533 does not constitute a federally-required rule of exclusion if the search was otherwise reasonable. (*Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1467-1470; see *People v. Glass* (1976) 56 Cal.App.3d 368, 372-373.)

The only federal counterpart to Penal Code section 1533 is Rule 41(e)(2)(A)(ii) of the Federal Rules of Criminal Procedure. Federal courts have not treated a violation of Rule 41 as compelling suppression. (E.g., *United States v. Spencer* (8th Cir. 2006) 439 F.3d 905, 913; *United States v. Schoenheit* (8th Cir. 1988) 856 F.2d 74, 76-77; *United States v. Comstock* (5th Cir. 1986) 805 F.2d 1194, 1205-1206.)

Defendant aims to trump this body of precedent with a decision of the United States Supreme Court, claiming that *Jones v. United States* (1958) 357 U.S. 493 establishes that an unauthorized nighttime residential search is a Fourth Amendment violation. Defendant's claim is immediately suspect because *Jones* involved a federal prosecution, did not mention state law, and occurred three years before the exclusionary rule was made applicable to the states in *Mapp v. Ohio* (1961) 367 U.S. 643. Moreover, defendant is unable to point to any decision by a state or federal court squarely holding that *Jones* states a constitutional rule that is applicable to state prosecutions. And while it is true that *Jones* did involve a nighttime search not authorized by the magistrate's warrant, and the Supreme Court did conclude that the conviction "cannot be squared with

the Fourth Amendment" (*Jones v. United States*, *supra*, at p. 497), the court has subsequently made it clear that the sole constitutional dimension of *Jones* concerned the issue of standing to challenge the legality of a search. Otherwise *Jones* was only applying Rule 41. (*Rakas v. Illinois* (1978) 439 U.S. 128, 132-133, fn. 2; *Alderman v. United States* (1969) 394 U.S. 165, 173, fn. 6.) Defendant does not argue that the search of his residence, notwithstanding the issue of timing, was otherwise constitutionally unreasonable. (See *Rodriguez v. Superior Court*, *supra*, 199 Cal.App.3d 1453, 1470.)

Defendant has marshaled an impressive amount of material to substantiate his claim that residential searches conducted at night were regarded as unreasonable by the Framers. Whether we find it persuasive of defendant's thesis is unimportant. What is important is whether defendant's trial counsel could make a reasonable tactical decision not to seek suppression on the ground appointed appellate counsel has developed. Assuming that he did not have had the benefit of the scholarship evident in defendant's opening brief, trial counsel could make that decision, based on the absence of any authority interpreting *Jones* as defendant now reads it, and counsel's anticipation that if this new basis for suppression was advanced the trial court would reject it on the basis of *Rodriguez*. Trial counsel could sensibly decide a better chance of success rested with a suppression motion focused on a single issue. Such a decision would be a reasonable tactical choice, and thus insufficient to compel reversal. (E.g., *Yarborough v. Gentry* (2003) 540 U.S. 1, 8; *People v. Gutierrez* (2009) 45 Cal.4th 789, 804-805; *People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

II

Renschler testified only with the benefit of a grant of immunity. His situation clearly obligated the trial court to instruct the jury with CALCRIM 334, which it did, as follows:

"Accomplice testimony must be corroborated.

"Before you may consider the statement of Michael Renschler as evidence against the defendant regarding the crime of possession of methamphetamine for sale, you must decide whether Michael Renschler was an accomplice to that crime. A person is an

accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

"One, he or she knew of the criminal purpose of the person who committed the crime;

"And, two, he or she intended to and did, in fact, aid, facilitate, promote, encourage or instigate the commission of the crime, or participate in a criminal conspiracy to commit the crime.

"The burden is on the defendant to prove that it is more likely than not that Michael Renschler was an accomplice.

"An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of the crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.

"A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute those who may commit that crime is not an accomplice.

"A person may be an accomplice even if he or she is not actually prosecuted for the crime.

"If you decide that a witness was not an accomplice, then supporting evidence is not required and you should evaluate his or her testimony as you would that of any other witness.

"If you decide the witness was an accomplice, then you may not convict the defendant of possession for sale of methamphetamine based on his or her statement or testimony alone. You may use the statement or testimony of an accomplice to convict the defendant only if:

"One, the accomplice's statement or testimony is supported by other evidence that you believe;

"Two, that supporting evidence is independent of the accomplice's statement or testimony.

"And, three, that supporting evidence tends to connect the defendant to the commission of the crime.

"Supporting evidence, however, may be slight. It does not need to be enough by itself to prove that the defendant is guilty of the charged crimes, and it does not need to be enough by itself to prove that the defendant is guilty of the charged crimes, and it does not need to support every fact mentioned by the accomplice in the statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may [not], however, arbitrarily disregard it. You should give that testimony or statement the weight you think it deserves after examining it with care and caution and in light of all of the other evidence."

Renschler's testimony has nothing to do with the possession of an illegal firearm and ammunition. But defendant contends the instruction was erroneous in limiting Renschler's status as a possible accomplice to the possession for sale charge, and not including the sales charge. Defendant further contends that the jury should have been instructed with CALCRIM 335 that Renschler was an accomplice as a matter of law.

"The buyer of narcotics cannot be prosecuted for selling them to himself or herself, hence is not an accomplice of the seller. (*People v. Hernandez* (1968) 263 Cal.App.2d 242, 247." (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 98, p. 135.) In his brief, defendant cites five other decisions supporting this rule, and only one (*People v. Ramirez* (1952) 113 Cal.App.2d 842) opposing it. From this supposed conflict, defendant offers that we should choose "which decisional line to follow." We already have. One of the five decisions cited by defendant, *People v. Freytas* (1958) 157 Cal.App.2d 706, is from this court, and the most recent opinion on the point, following *Hernandez*, is from another Division of this District. (*People v. Label* (1974) 43 Cal.App.3d 766.) More significantly, our Supreme Court appears to

agree with us. (See *People v. Lein* (1928) 204 Cal. 84, 86 [in liquor possession case, court stated that "The later possession of the purchaser is not the possession of the seller."].) We cannot fault the trial court for not ignoring *Freytas*, *Label*, and *Lein sua sponte*. Nor can we fault trial counsel for not asking the court to flout these binding authorities and ask that the jury be instructed that Renschler was an accomplice as a matter of law to both of the drug charges.

III

Defendant's final contention is that his trial counsel should have moved for directed acquittal on all counts pursuant to Penal Code section 1118.1, and was incompetent in not doing so. The obvious predicate for this contention is defendant's assumption that his other contentions will succeed. The preceding discussion demonstrates that the predicate fails.

The sole surviving particular is that a motion for acquittal would have to have been granted because the prosecution closed its case-in-chief without submitting proof of defendant's status as a convicted felon, an element of the gun and ammunition charges. The record shows that the prosecution's final witness left the stand during the morning session on June 7, 2010, and the prosecution rested. When the afternoon session commenced, the court advised the jury: "The People have rested. [¶] Mr. Lepie [defense counsel], I understand that you have a stipulation that you would like to read into the record?" Defense counsel then told the jury "Ladies and Gentlemen, Mr. Solomon and the prosecution have stipulated or agreed that Mr. Solomon was previously convicted of a felony." It is a reasonable inference that defendant's ex-felon status was deemed unworthy of the jury's time because there was no question of the prosecution's ability to prove it, and both sides agreed to put the information before the jury in the form of a stipulation. It is also reasonable to assume that such an agreement had been reached before the prosecution rested its case-in-chief. Thus, if the motion for acquittal defendant now embraces had been made, it might have evoked an outraged accusation of bad faith by the prosecution. And the trial court could have frustrated such a motion by simply permitting the prosecution to reopen its case to establish what nobody denied, least of all

trial counsel, who was reasonably trying to avoid having the jury informed that defendant had *five* felony convictions, among which were three drug convictions and one for the identical weapons charge. Acting to prevent that damaging information brought to the jury's attention would obviously qualify as a reasonable tactical objective.

All the advanced instances of incompetent conduct have justifications within the range of reasonable professional choice. For this reason, and because we see no reasonable probability of a more favorable result had trial counsel acted differently, all of the present attacks on trial counsel's competence must fail. (See, e.g., *People v. Lopez* (2008) 42 Cal.4th 960, 966; *People v. Maury* (2003) 30 Cal.4th 342, 389.)

DISPOSITION

The judgment of conviction is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

_____
Lambden, J.